

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE                    )  
  )  
                  v.                            ) ID 0911008358  
  )  
LESLIE D. SMALL,                        )  
                                  Defendant.    )

**FINDINGS AFTER PENALTY HEARING**

Penalty Hearing Concluded:   April 14, 2011  
Decided:                        July 22, 2011

David Hume, IV, Esquire and Peggy Marshall, Esquire, Deputy Attorneys General, Georgetown, Delaware, attorneys for the State of Delaware.

E. Stephen Callaway, Esquire and John Daniello, Esquire, Georgetown, Delaware, attorneys for Defendant.

STOKES, J.

## **I. BACKGROUND**

The Defendant, Leslie D. Small (“Mr. Small” or “the Defendant”), was convicted on April 5, 2011, by a jury of two counts of Murder in the First Degree, 11 *Del.C.* § 636(a)(1), (a)2; three counts of Possession of a Deadly Weapon During the Commission of a Felony, 11 *Del.C.* § 1447(a); one count of Robbery in the First Degree, 11 *Del.C.* § 832, and one count of Burglary in the Second Degree, 11 *Del.C.* § 825. The victim was June D. McC Carson (“Mrs. McC Carson” or “the victim”). She was killed on or about November 11, 2009. The State of Delaware (“the State”) and Small’s defense team (“the defense”) gave notice of the aggravating and mitigating circumstances for the penalty hearing on the appropriate punishment for the murder convictions. The penalty hearing began on April 7, 2011 and concluded on April 14, 2011.

The convictions arose out of a criminal episode where the Defendant killed the victim to obtain her money for drugs. Employed as a taxi driver, he drove the victim to a local bank where she withdrew cash at the drive-through window. After taking her to a beauty shop and to a drug store, he drove her home. Inside the house, he murdered her with scissors and then fled with her purse. Because of this conduct, the Defendant was indicted for intentional murder, Count 1, by stabbing the victim to death and Count 3, felony murder, by causing the victim’s

death during the robbery, and related charges.

At the penalty hearing, the State relied on four statutory aggravating circumstances set forth in 11 *Del.C.* § 4209(e) for intentional murder.

- 1) The Defendant was previously convicted of a felony, Robbery in the First Degree, and the underlying facts of the Robbery in the First Degree conviction involved the use of, or threat of, force or violence upon another person. Section 4209(e)i.
- 2) The murder was committed for pecuniary gain. Section 4209(e)o.
- 3) The victim was 62 years of age or older at the time of the murder. Section 4209(e)r.
- 4) The murder was committed while the Defendant was engaged in the commission of, or attempt to commit or flight after committing or attempting to commit Robbery in the First Degree. Section 4209(e) j.

The prosecution also relied on seven non-statutory aggravating factors.

- 1) The Defendant's history of violence against women, age 50 or older.
- 2) The impact of June McCarson's murder on her relatives, friends and community.
- 3) The Defendant's lack of rehabilitation following periods of incarceration, including his probation status at the time of the murder.

- 4) The Defendant's history of substance abuse, including the months preceding the murder.
- 5) The Defendant's lack of remorse.
- 6) The Defendant's repetitive criminal history.
- 7) The Defendant's eligibility for habitual offender status and mandatory life sentence, pursuant to 11 *Del.C.* § 4214(b), if he was found guilty of Robbery in the First Degree.

The defense relied upon the following mitigating circumstances:

- 1) The Defendant is remorseful.
- 2) The Defendant is presently 53 years old.
- 3) The Defendant has a very strained relationship with his elderly parents.
- 4) Two traumatic childhood events left the Defendant with negative impressions that were never addressed through therapy or counseling. When the Defendant was 7, his family home burned to the ground and the family lost all they had. He also was exposed to and viewed the consequences of the race riots in Newark, New Jersey as a small child.

- 5) When the Defendant was 16 years old, his parents placed him in a residential treatment center.
- 6) The Defendant has a borderline intellectual functioning (IQ) level. As a result, the Defendant was not successfully educated. He repeated at least two grades and dropped out of school in the ninth grade. This has limited his opportunity for significant employment as an adult.
- 7) The Defendant's brother, Nathan, was killed as the result of being a victim of a robbery. At the time of this incident, the Defendant was incarcerated.
- 8) The Defendant has not had a significant relationship with his other sibling.
- 9) The Defendant has a strained relationship with his three adult children.
- 10) After moving to Delaware in 2002, Leslie Small did seek medical, mental health and substance abuse treatment as needed not only to comply with probation, but also to improve his overall mental and physical condition and not return to illegal substance abuse.

- 11) The Defendant has been married to Celeste Small since 2002 and has a continuing relationship with her and her adult children.
- 12) The Defendant has been active in his church and has a good relationship with his pastors and members of the congregation. The Defendant plays bass guitar for the church choir and other singing groups within the church.
- 13) While the Defendant was employed, he was considered a consistent worker whose attendance and performance were evaluated by his supervisors as favorable.
- 14) The Defendant has HIV/AIDS which was diagnosed in 1999. He also suffers from Hepatitis C. He experiences physical and neurological problems from these conditions and from the medications prescribed to combat them. The Defendant suffers from nephrolithiasis, uric acid buildup, renal insufficiency, peripheral neuropathy, chronic depression, anemia, and leucopenia, enlarged prostate and history of prostatitis. Various doctors have prescribed multiple medications for these conditions.
- 15) The Defendant has not been able to resolve his chronic substance abuse problem. As a result of his prior robbery convictions, the

Defendant was Court ordered to an intensive, long-term residential substance abuse program known as the Key Program, to be followed by a residential/outpatient drug treatment program known as the Crest Program, to be followed by a long term of probation. The Defendant was medically excused from these programs as a result of his HIV/AIDS and Hepatitis C. The Defendant was not provided with any short-term or long-term substance abuse treatment programs.

- 16) The Department of Probation and Parole (“P & P”) failed to adequately evaluate the Defendant’s need for substance abuse treatment in lieu of the Key/Crest programs originally ordered by the Court. P & P failed to properly supervise the Defendant during his probation, resulting in his return to drug use.
- 17) The murder was not premeditated or the result of substantial planning.

As to Count 3, Felony Murder, the State alleged the following statutory aggravating circumstances:

- 1) The murder was committed while the Defendant was engaged in the commission of, or attempting to commit, or flight after committing, or attempting to commit robbery. Section 4209(e)j.

The State and the defense alleged the foregoing non-statutory aggravating and mitigating circumstances for the jury's consideration in Count 3 as well.

During the penalty hearing, both sides presented evidence. The Defendant exercised his right of allocution. Given the finding of guilt of Count 3's felony murder, which mirrored the statutory aggravator, a verdict was directed to establish that statutory aggravator for Count 3. The jury found unanimously and beyond a reasonable doubt the existence of all the statutory aggravators alleged for Count 1, intentional murder.

Concerning the punishment, the jury was also asked the following question: "As to Count 1 of the indictment intentional murder, does the jury find by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist?" The same question was asked as to Count 3, Felony Murder. The jury was instructed that an affirmative response was a vote to recommend the death penalty. Its vote was 12 to 0 in favor of the death penalty for both counts.

Consequently, Leslie Small is eligible for the death penalty because of the jury's findings on the statutory aggravating circumstances. As a result, the Court must review the evidence, and like the jury, make two findings. The Court must first find, beyond a reasonable doubt, the existence of at least one statutory aggravating factor. If the answer is yes, the Court must then consider whether any aggravating factors, including statutory aggravating factors previously determined to exist, outweigh any mitigating factors relied upon by the Defendant. In this process, the Court must examine the circumstances and details of the homicide and the character and propensities of the offender. After review, the Court must decide whether capital punishment or life imprisonment is the appropriate sentence.

## **II. THE NATURE AND CIRCUMSTANCES OF THE HOMICIDE**

The Defendant was employed by a taxi company outside of Lewes, Delaware. The victim lived in Lewes and was known to the Defendant. As a taxi driver, he took her to different places before the murder. Mrs. McCarson was 78 years old, about 5' 4 ½" in height and weighed about 132 lbs. She was vulnerable, frail, and elderly. The Defendant was 51 years old, about 6' 4" in height, and weighed about 170 lbs.

Mr. Small is a chronic cocaine user. Although there were periods in his life when he did not abuse the drug, the Defendant returned to crack in September of 2009 at the taxi company. Mr. Small smoked cocaine both immediately before and after Mrs. McC Carson's murder, but he needed money to buy more. His use of cocaine was voluntary, and he had mental awareness of his actions.

On November 11, 2009, Mrs. McC Carson needed a taxi ride to do her errands. In the morning, the Defendant picked her up at her home in the Donovan-Smith Trailer Park. Mr. Small took her to a local branch of the Wilmington Trust Company where they had been before. He helped her deposit seven hundred and forty-eight dollars through a vacuum tube. He saw that she received several hundred dollars from the transaction. He then dropped her off at a beauty parlor. About two hours later, he returned to the salon and took her to a drug store.

After visiting the drug store, Mr. Small took Mrs. McC Carson home at about 3:35 p.m. Having seen her cash, he decided to rob her to get money for more crack. The Defendant knocked Mrs. McC Carson to the floor and straddled her from behind, breaking her back with the force he used against her. While she struggled against him, furniture and other items were knocked out of place. After unsuccessfully trying to strangle her with a towel, the Defendant found red-handled scissors in a kitchen drawer. The blades were about three inches long.

The Defendant stabbed Mrs. McCarson over twenty times wounding her on the neck. Other stab wounds were on her face, eye, and hands. She also had defensive wounds on her hands. Although the purse was under his control, although the victim screamed and wanted him to get off of her, and although the Defendant could have spared her life, Leslie Small murdered Mrs. McCarson to keep her quiet and thereby cover up his crimes.

As he left her home, the Defendant took the bloody towel, the scissors, and her purse. He inadvertently dropped the scissors near the driveway. He drove away to a different area and threw away the towel, the purse, and his bloody clothes.

The Defendant kept \$500 from the purse and used it to buy cocaine.

Mr. Small called his wife Celeste and asked for a key to their residence. He told her that he needed to change clothes because he had gotten sick.

The victim's dead body was discovered at about 11:00 a.m. on November 12<sup>th</sup> by two women from Meals on Wheels. A neighbor reported a cab was in her driveway in the afternoon of the 11<sup>th</sup>, and observed a tall man with a hat inside the residence. The police determined Mrs. McCarson used the taxi service and learned that Defendant had driven her on that day. During preliminary questioning at the taxi company, the Defendant denied any knowledge of the

victim's death.

Later investigation, including interviews with the Defendant's wife, led police to conclude that the Defendant was the killer. When the police called him, he agreed to be interviewed, but he lied about his location, and did not appear at the police station. Later, he was arrested at the Traveler's Inn in Milford, Delaware. After initially declining to speak, he later initiated an interview and confessed to killing Mrs. McC Carson. His confession was made early on the morning of November 13, 2009.

From the autopsy, the medical examiner determined the immediate cause of death to be multiple stab wounds to the neck. The victim's injuries arose from both blunt and sharp forces. Blunt force trauma included neck compression, neck bone fracture, voice box fracture, abrasions, contusions to the head, face and left forearm injuries. Further, her back was pushed in and two discs were fractured and popped open on the lower spine. The sharp force trauma included twenty stab wounds to the neck, eye, eyelid, collarbone, and right hand. There were seven cuts on the front of the neck, two cuts of the jugular vein, one to the carotid artery, and one to the epiglottis. These injuries were inflicted by the scissors. Bruising and defensive wounds were observed on her left arm, hands and fingers. DNA analysis matched Mrs. McC Carson's blood with blood samples from the scissors

and towel.

Mrs. McCarson survived the attempted strangulation, which she tenaciously resisted.

### **III. DISCUSSION**

Upon review of the evidence, I find that all of the statutory aggravators have been established beyond a reasonable doubt. Therefore, the second question must be addressed to determine which penalty, death or life imprisonment, should be imposed after balancing all aggravating and mitigating circumstances.

Throughout the decision, the character and propensities of the offender will be considered.

#### **A. STATUTORY AGGRAVATING CIRCUMSTANCES**

Section 4209(e)i. The Defendant was previously convicted of a felony, Robbery in the First Degree and the underlying facts of this felony involved the use of, or threat of force or violence upon another person.

On October 24, 2005, the Defendant signed a plea agreement and pled guilty to the charge of Robbery in the First Degree. By doing so, he admitted the elements of the charge which were: “Leslie D. Small, on or about the 25<sup>th</sup> day of May, 2005, in the County of Sussex, State of Delaware, when in the course of committing theft, did use or threaten the immediate use of force upon Mary

Pickrell with the intent to compel Mary Pickrell to deliver up property consisting of her purse, and in the course of the commission of the crime or the immediate flight therefrom, he caused physical injury to Mary Pickrell who was not a participant in the crime, in violation of Title 11, Section 832(a)(1) of the Delaware Code.”

At the penalty hearing, Ms. Pickrell testified that on May 25, 2005, she was 49 years old. In the late afternoon, she was taking groceries to her car from the Super Giant parking lot. Approaching her from behind, someone put hands over her face and eyes and screamed at her to shut up. During the episode, her face was scratched and burned by a cigarette she had been smoking. Her assailant escaped in a car which almost crashed in its flight. Ms. Pickrell reported the license number, except for one digit to the Delaware State Police.

An officer traced the vehicle to the Defendant’s address. Upon arrival, Mr. Small tried to escape by climbing out of the kitchen window. He dropped Ms. Pickrell’s purse.

Robbery in the First Degree is a crime of violence. Ms. Pickrell was threatened with the use of force by the Defendant’s command for her to be silent. The Defendant used force by placing his hands on her body in an effort to control her. Physical injury was sustained through the Defendant’s scratching of her face

and crushing the cigarette on her mouth. The plea agreement reflects that the Defendant stole \$200 from Ms. Pickrell's purse.

Section 4209(e)o. The murder was committed for pecuniary gain.

The Defendant killed the victim for her money.

Section 4209(e)r. The victim was 62 years of age or older at the time of the murder

Mrs. McCarron was 78 years old at the time of the homicide.

Section 4209(e)j. The murder was committed while the Defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit Robbery in the First Degree.

As to Count 3, the jury's determination of guilt established the statutory aggravator. While engaged in the commission of Robbery in the First Degree, the Defendant killed the victim to silence her.

#### **B. NON-STATUTORY AGGRAVATING CIRCUMSTANCES**

1) The Defendant's history of violence against women age 50 or older.

Also, on October 24, 2005, Defendant pled guilty to a charge of Robbery in the Second Degree, a lesser-included offense of Robbery in the First Degree. Mr. Small admitted he used or threatened the immediate use of force upon Barbara Maher on May 16, 2005 to compel her to deliver up her purse. The crime occurred

outside of the Hampton Inn on Rt. 1. Ms. Maher was 62 years old and was pushed from behind at the entrance to the hotel. She fell to the ground. The Defendant shoved her again and stole her purse. She suffered abrasions to her left elbow and knee where her skin was torn. The Defendant fled in a car.

By pushing and shoving the victim, the Defendant acted violently even though medical attention was not sought.

On May 18, 2005, Mary Lewes was returning home from Beebe Medical Center in Lewes. She was a volunteer worker and 82 years old. She stopped at a grocery store on Route 1 north of Rehoboth. As she returned to her car, a man approached her from behind. He applied pressure to her right leg and placed his hand over her mouth and leg. He demanded money, telling her he could have killed her. As a result, the victim gave him cash from her pocketbook. Ms. Lewes identified the Defendant.

As part of the plea agreement, the Defendant agreed to pay \$158 in restitution to Ms. Lewes. Ms. Lewes has received partial restitution. Although he did not inflict physical injury, the Defendant exhibited forceful, threatening, and violent behavior toward the victim. He intimidated her to pay him money to avoid the risk of more serious violence.

On May 21, 2005, Frances Litten, then 72 years old, was walking on Savannah Road in Lewes. A man punched her side, causing her pocketbook to fall. He picked up the purse and ran away. Ms. Litten did not have cash, but just charge cards. The investigating officer found two witnesses who identified the Defendant through a photographic lineup. The victim developed a bruise from the assault. As part of the plea agreement, the Defendant agreed to pay the victim \$25 in restitution and she has received \$20.

During police investigation on May 25-26, the Defendant admitted that his arrest was a blessing and that he had to stay off of cocaine. Before being convicted, his wife Celeste, contacted Christiana Care Wellness Center and conveyed her belief that he was addicted to cocaine. The Defendant acted violently in an effort to obtain Ms. Litten's money.

This non-statutory aggravator has been established.

2) The impact of June McCarson's murder on her relatives, friends, and community.

At the time of her murder, June McCarson's immediate family had passed away. However, she developed close family type relationships with her two caregivers, Katherine Pavlik and Debra McGhee. They testified about their warm relationship, how they looked forward to being with her, especially sharing her

75<sup>th</sup> birthday, and how her death distressed them. Mrs. McC Carson's hairdresser, Susan Todd, had a close, 20-year relationship with the victim. They often ate lunch together. All three witnesses have been adversely impacted, and this non-statutory aggravator has been established.

3 and 8) The Defendant's lack of rehabilitation following periods of incarceration, including his probation status at the time of June McC Carson's murder and his eligibility to be sentenced as a habitual offender to a mandatory term of life imprisonment.

These non-statutory aggravators are separate but related. The rehabilitation is a factor for habitual offender status. Consequently, both are considered here for convenience but are technically distinct.

The Defendant was convicted in the Superior Court of New Jersey for Armed Robbery with Firearm. The offense date was September 3, 1976. He was convicted and sentenced on December 9, 1976. The judge sentenced the Defendant to an indeterminate term at the Youth Reception and Correction Center with a five-year maximum. Born on January 24, 1958, the Defendant was 18 years old. The court records reveal that the Defendant possessed a sawed-off shotgun and forcibly took \$70.00 from the victim, Epifano Nieves. Using a sawed-off shotgun is a very serious offense. The victim was put in fear and could have been

seriously hurt.

After serving the sentence, the Defendant was found guilty of Kidnapping, Terroristic Threats, Aggravated Sexual Assault, and Armed Robbery on August 11, 1983 in Asbury Park, New Jersey. The offense date was February 14, 1983. The Defendant was 25 years of age.

Trial testimony was read into the record. Colleen Griffin, the victim, a young mother with two children, was kidnapped, raped, robbed and subjected to terroristic threats in her car. The Defendant forced her to submit by the threat of a concealed handgun. He claimed killing women before. When finished, he left the victim without her pants and told her “you’re going to freeze” and laughed. The weather was very cold.

Consequently, Mr. Small was sentenced to thirty years incarceration for the Kidnapping, concurrent with two consecutive fifteen-year imprisonment terms for Aggravated Sexual Assault and Armed Robbery. He received a five-year concurrent prison sentence for the Terroristic Threats offense.

The judge gave the following reasons for the long sentence:

The seriousness of the offenses speak for themselves. the victim was kidnapped and terrified, her clothes taken from her and she was left with no clothing on the streets. As a direct result of the rape and

robbery, the victim moved out of the state. She is presently receiving psychological counseling on a weekly basis to help her overcome the trauma of the incident. After serving nineteen years, the Defendant was released from custody in New Jersey on March of 2002. He was then 44 years of age. He moved to Delaware and married Celeste Small.

Thereafter, as shown, the Defendant was convicted on October 24, 2005 for Robbery in the First Degree with an offense date of May 25, 2005. Mary Pickrell was his victim. He was sentenced to ten years imprisonment and after serving four years at Level 5, the balance was suspended for five years Level 3 probation. The Robbery in the Second Degree conviction, for his crime on May 16, 2005, involved Barbara Maher as his victim. He received a five year Level 5 sentence, suspended for five years concurrent Level 3 probation. In May of 2005, the Defendant was 47 years of age.

The Defendant was released from Sussex Correctional Institution on December 27, 2008. He was then 50 years of age. From age 18, the Defendant had spent most of his adult life in prison.

On November 11, 2009, when he murdered Mrs. McCarson, the Defendant was on probation for his convictions of Robbery in the First and Second Degrees on October 24, 2005. The custody status by itself is an aggravating circumstance.

The Defendant was 51 years old.

There was sufficient time between each sentence of incarceration and the later offense dates to show that the Defendant failed to rehabilitate himself. Consequently, under Delaware law, his prior felony record makes him eligible to be sentenced as an habitual offender. The Defendant must receive a mandatory life sentence for each of the Robbery in the First Degree and Burglary in the Second Degree convictions involving June McC Carson. If he had left her alive, and just taken her purse, a mandatory life sentence would be required. There would be no accountability for the murder. These non-statutory aggravators have been established.

4) The Defendant's history of substance abuse, including the months preceding the murder.

From September of 2009 through November 10-13, 2009, the Defendant was using crack cocaine, which was the motive for the murder. Mr. Small admitted to using crack for a six-month period around the time of the 2005 robberies.

The Defendant has a history of using marijuana, heroin, and cocaine. He also used several stimulants and hallucinogens without a prescription. The Defendant was first exposed to drugs when he was 15 years old.

This non-statutory aggravator is established to the extent that the Defendant used cocaine knowing he was committing a crime and to the extent that he was not candid with P & P or to his healthcare providers. Honest answers would have increased the likelihood of tighter scrutiny and care. The Defendant will not be punished for his crack addiction alone.

5) The Defendant's lack of remorse.

The defense asserted that the Defendant was remorseful. In allocution, the Defendant claimed he was sorry and accepted responsibility for his criminal conduct. However, at the time of the killings, the Defendant attempted to cover up the homicide. His 2011 words of remorse are hollow when viewed in light of his repetitive criminal background. Further, as part of the Delaware probation process, the Defendant was given a risk assessment on February 25, 2009. He was asked about his 2005 criminal activities. In response, he stated that he robbed an elderly person and that bothered him. Also, although believing his 2005 arrest was a blessing, he did not redirect his life and even thought he could beat one of the charges. The more credible record does not support, but rather refutes, a claim of remorse. Mr. Small was sorry to have been caught and to face the prospect of capital punishment. This non-statutory aggravator has been established.

6) The Defendant's repetitive criminal history.

Until moving to Delaware in 2002, the Defendant was a New Jersey resident. His criminal history is repetitive in New Jersey and again in Delaware with the 2005 robbery conviction and with the present murder, robbery, burglary and associated weapon offenses.

The New Jersey juvenile record is:

2/7/73, took father's car without permission, operating a motor vehicle without a license, and automobile accident.

7/9/73, malicious damage.

12/19/73, violation of probation.

7/17/74, larceny - bribe, trespass, A & L, incorrigible.

11/5/75, violation of probation.

Defendant's adult New Jersey criminal record is:

9/2/76, robbery.

5/21/79, shoplifting.

8/8/79, conspiracy to commit fraud.

4/13/80, contempt of court.

5/7/80, attempted credit card fraud.

10/3/81, possession of CDS (cocaine), possession of a hypodermic needle.

5/10/83, kidnapping, terroristic threatening, sexual assault, armed robbery.

This aggravator is established.

**C. MITIGATING CIRCUMSTANCES**

1) The Defendant is remorseful.

Without undue repetition, in allocution the Defendant expressed sorrow for the murder and accepted responsibility for it. This expression of remorse pales by comparison to his effort to cover up the crimes. Further, when commenting on the 2005 robberies, he acknowledged robbing an elderly woman and said that he would not want this to happen to his family. However, his criminal record shows a pattern of criminal conduct that is unabated and without remorse. The Defendant's assertion is not credible. His words about the 2005 arrest being a blessing are shallow, as well. Therefore, this mitigator is not given weight.

2) The Defendant is presently 53 years old.

The Defendant's age carries slight weight to make life imprisonment a more appropriate punishment.

3) The Defendant has a very strained relationship with his elderly parents.

The Defendant's parents had high expectations of him. His father was a college graduate and a successful funeral director. His mother had a year of college and was a homemaker. They set rules and were strict. His parents hoped that the Devereux program would diminish the Defendant's anti-social behavior

and would motivate him to do well in life.

In 2005, when the Defendant told his parents about the robberies, he received encouragement and was told to improve himself and learn from his mistakes. Various counseling records reveal that the Defendant did not report any physical abuse. His brother, Kevin Small, as well as his wife Celeste related that the Defendant enjoyed a good family relationship. Kevin did not see any physical abuse by his parents.

In allocution, Defendant shared that his father beat him with a belt. One of the records indicates that his mother and father severely beat him. Given his incorrigible behavior documented at Devereux, this kind of corporal punishment, not untypical for the time, probably occurred but it is too remote to have significance.

This mitigator is given little weight because the relationship is better than portrayed.

4) Two traumatic childhood events left negative impressions of Leslie Small that were never dealt with through any therapy or counseling. At age 7, his family home burned to the ground and the family lost all they had. He also was exposed to and viewed the consequences of the race riots in Newark, New Jersey as a small child.

In 1965, when he was 7 years old, the Defendant burned the family home down. All their property was lost and they had to live elsewhere. The Fire Marshall did not believe any action should be taken. The parents left it at that and the subject was not discussed. The burning was an isolated instance. Defendant's subsequent criminal offenses do not involve arson.

In the 1960's, the Defendant and his family viewed the civil unrest in Newark, New Jersey from their apartment. While the turmoil upset the family, this event is in the distant past without significant effect. In 1970, the Small family moved to Lakewood, New Jersey to a better environment. Defendant's younger brother, Kevin, testified at trial. Like his father, he is a successful funeral director with homes in New Jersey and New York. The riots did not have a lasting impact on him. Further, the Defendant's first cousin, James Augburn was not affected by the riots. The Defendant was as close to his parents as most young people are, and he had family support.

When the Defendant was 16 years old, he was placed in residential treatment at Devereux. Both traumatic situations were reported in the admission process and did not appear to be contributing factors to his problems.

These circumstances are too distant to have meaningful mitigating value.

5) When the Defendant was 16 years old his parents placed him in a residential treatment center.

\_\_\_\_\_Defendant was admitted to Devereux in an effort to turn his behavior in a positive direction. His family felt he was in need of a more structured setting because of his involvement with anti-social groups. Defendant had a poor school record. He did well until the third grade, when his teacher observed a lack of motivation. He had to repeat the third and seventh grades and was socially promoted to the eighth and ninth grades. At a normal progression, he would have been entering the tenth grade.

While in school, the Defendant was absent most of the time due to suspension and truancy. He had no interest in school and no respect for the authority of the school administration. He was brought before the juvenile court several times for incorrigibility and having run away. When he admitted to Devereux, he was put on probation.

The Defendant was enrolled at Devereux in December 1974. In October 1975, he was discharged for anti-social behavior. When terminated, he was evaluated by a psychiatrist, R.T. Marrone, M.D, who reached the following conclusions in his clinical summary:

Throughout the course of Leslie's programming at Devereux, it was

noted that initially after enrollment in December of 1974, Leslie appeared to respond to the structure in the open setting. However, he began to withdraw from the activities and was caught up in numerous anti-social behaviors which occurred within the past three months prior to his termination at the Devereux School. Specifically, Leslie began to manifest overt sadistic behavior towards other youngsters in one occasion causing a laceration of a boy in a fight, and on another occasion, beating a female student with a rope and forcing her to have sex with him. There is at least one other reference in the record of another attack on a female pupil beating her about the neck and head. In spite of several therapeutic breaks and continued psychiatric and therapeutic support, Leslie appears to be deteriorating in his social functioning and maladaptive behavior.

He concluded that his “Psychiatric opinion is that of unsocialized aggressive reaction of childhood.” A long-term structured residential placement was recommended to prevent him from hurting others and to teach him self-control. The Defendant was 17 years old.

The Devereux placement was an attempt to help the Defendant, which was

unsuccessful. The mitigators have marginal probative value.

6) The Defendant has a borderline intellectual functioning (IQ) level. As a result, the Defendant was not successfully educated. He repeated at least two grades and dropped out of school in the ninth grade. This has limited his opportunity for significant employment as an adult.

Dr. Joseph Zingaro, Ph.D. is a licensed forensic and school- certified psychologist. He is employed at People's Place in Milford, Delaware. He assessed the Defendant's intellectual functioning and adaptive skills. Based upon his review of records, interviews of the Defendant and test results, he determined that the Defendant has a borderline intellectual functioning level but was not in the mentally retarded range.

His conclusions were supported by the Devereux records. On release, the Defendant's IQ range was 72-73, based on various test scores ranging from 64-80.

When evaluating the Defendant, Dr. Zingaro also gave him a general IQ test. The Defendant scored 80 for verbal comprehension, 75 for perceptual reasoning, and 77 for working memory. His full-scale score was 71, but was above the range for mental retardation. Dr. Zingaro explained that on a scale of the dullest to the brightest, Mr. Small would be fourth from the bottom.

On an Adaptive Behavior Assessment Test, out of nine areas of functional

academics, the Defendant scored low in two areas - home living and safety. The two low scores were false positives because the Defendant chose these behaviors and lacked motivation. For example, the Defendant indicated that he would do things only when he wanted to.

On a Global Assessment of Functioning scale (GAF), performed by Christiana, the Defendant was determined to be 61-70 on a scale of 100. That is, he had some mild symptoms or some mild impairment in functioning. The GAF sought to reflect the degree of impairment in emotional, occupational and social functioning. Major impairment in functioning, judgment, thinking, or mood falls within the 31-40 range.

Moreover, the Defendant has appropriate adaptive abilities. He worked as an inventory specialist at Walmart in 2003 and 2004. He studied for and obtained an driver's license to operate a DART bus prior to the 2005 robberies. Before the murder, he worked at McDonald's and also at the taxi company. He kept a written log of his calls and fares.

The Devereux records showed that the Defendant was promoted to the 10<sup>th</sup> grade only because he had twice been socially promoted to the next grade. One of his main problems has been a lack of motivation. His long incarceration obviously affected his prospect for later employment opportunities.

This mitigator has mixed probative value.

7) The Defendant's brother, Nathan, was killed as the result of being a victim of a robbery. At the time of this incident, the Defendant was incarcerated.

Nathan was born in 1956 and was two years older than the Defendant. Nathan visited the Defendant in prison and was close to him. Nathan was killed in 1987. He was the victim of a robbery.

This mitigator is given little weight because of the passage of time.

8) The Defendant has not had a significant relationship with his other siblings.

The Defendant is the middle child of three brothers, one of whom is deceased. The Defendant's brother Kevin is one year younger. He lives in New Jersey. Kevin visited the Defendant while he was imprisoned in New Jersey and stayed in touch with him. While on probation in 2009, the Defendant was given a travel permit to visit him. Kevin cares for the Defendant. Their limited time together is due to the Defendant's imprisonment. In 2009, Defendant indicated that he had weekly contact with his brother.

This factor has slight probative value.

9) The Defendant has a strained relationship with his three children.

Defendant has three adult children, Omar, Hassan and Shaudet Moore. They live in England, Florida, and New Jersey. He does not have a personal relationship with them. However, the problem more likely resulted from Defendant's incarceration. The Defendant has had an ongoing relationship with Omar since 2003.

This factor is given little weight.

10) After moving to Delaware in 2002, Leslie Small did seek medical, mental health and substance abuse treatment as needed not only to comply with probation, but also to try to improve his overall mental and physical condition and not return to illegal substance abuse.

From 2003 through the time of the Level 5 imprisonment for the First Degree Robbery in October of 2005 and from his release in 2008 until the murder, Mr. Small received much medical care. In large part, treatment focused on his HIV condition, his neuropathy to his legs and feet and adjustment issues resulting from his New Jersey and Delaware incarcerations.

In his job at Walmart, he was required to stand for prolonged periods of time. This was a source of stress as he was physically limited by the neuropathy. After finding employment with DART, he often worked six days per week to cover for others who did not report to work. This also was a source of stress. At

different points, he experienced stress in his relationship with his wife.

In July 2003, the Defendant declined mental health treatment, but he accepted it in March 2004. By August 2004, he no longer saw a need for continued treatment. In an assessment completed on August 16, 2004, the Defendant reported that he had no history of mental illness or psychological disorders, and no need for counseling referrals.

Concerning substance abuse, on a medical assessment form dated May 27, 2003, the Defendant reported having used marijuana and that he stopped 3 years earlier. In the August 16, 2004 assessment, he reported no current or past difficulties with alcohol and/or other drug dependencies.

In a Christiana Care record of March 5, 2004, the Defendant reported history of cocaine, heroin, and marijuana use. The medical record reflects that the Defendant was HIV positive since 2001 and AIDS defined since August of 2002. He also had Hepatitis C with a history of anemia, leucopenia, enlarged prostate, bacterial pneumonia, nephrolithiasis from intravenous use, prostatitis and neuropathy of his feet. Mr. Small reported going to drug and alcohol counseling while incarcerated in New Jersey.

A review of his medical records from 2003 through 2005 does not show

treatment for drug abuse. The Defendant did not disclose a problem that required attention.

When the Defendant was sentenced on October 25, 2005, he was required to complete the Key-Crest continuum for drug abuse. He had used cocaine in a six-month period leading to the robberies. Because the Key Program is physically demanding, Correctional Medical Services recommended that the Defendant's sentence be modified, but did not have a particular program in mind after the Defendant's release. Mr. Small was tired and exhausted from the drug therapy for HIV. Further, the neuropathy in his legs and feet precluded strenuous physical activity. The Defendant was not medically well enough to complete the Key Program. During this period, also, the Defendant, through his wife, was requesting that his sentence be modified.

Because of the medical issues, the sentence was modified and the Defendant was released to Level 3 probation on December 27, 2008. Together with the recommendation of Harriet Lynette Williams-Glover, a medical health nurse practitioner with the Delaware Center for Justice and with P & P, the Defendant continued to receive medical care with Christiana Care and Sussex County Counseling. He was diagnosed with major depression and anxiety on April 9 and 13, 2009 and was given medications. The goals of the treatment were to help the

Defendant adjust to civilian life, to reduce depression and anxiety, to adhere to medical treatment, to seek employment, and to maintain sobriety.

In a Christiana progress record dated April 2, 2009, the Defendant misrepresented his history of substance abuse. He denied present use and claimed he had been clean for over eight years. On April 13, 2009, the Defendant again misrepresented that he had been clean for eight years. Also, he reported that his pain sometimes triggered urges to use.

On April 27, 2009, Mr. Small appeared motivated to participate in mental health treatment and to maintain sobriety and a stable life style. On May 18, 2009, he reported efforts to obtain a driver's license and to be less isolated at home. He did not use illegal drugs and reported no triggers or cravings to relapse. On June 18, 2009, the Defendant reported that his primary stress was his relationship at home, and he was advised to decrease anxiety, depression, and anger by removing himself from stressful situations. In a report dated June 18, 2009, the clinician found that the Defendant enjoyed having his ego stroked.

The Defendant did not receive treatment for his cocaine addiction because he was not candid about it with his treatment providers. Consequently, this mitigator has marginal value.

11) The Defendant is married to Celeste Small and has a continuing

relationship with her and her adult children.

In 2002, the Defendant married Celeste Small. She works at Beebe Medical Center and cares for the Defendant. Mr. Small does have a continuing relationship with her. Mrs. Small has four adult children, and the Defendant enjoys a relationship with one of them, Anthony.

If Mr. Small is executed, his loss would adversely impact Celeste and her children. His loss would also adversely affect his parents, brother Kevin and friends. This is a mitigating factor.

12) The Defendant has been active in his church and has a good relationship with his pastor and members of the congregation. The Defendant plays bass guitar for the church choir and other singing groups within the church.

Before both the 2005 robberies and the 2009 murder, the Defendant was active in local churches. Testimony from a pastor and deacons showed the Defendant's involvement in religious activities, including his playing of the bass guitar. Officials at Devereux noted that the Defendant has natural musical talent. He was a respected member of the congregations at the St. James A.M.E. Church in Lewes and at St. John's Second Baptist Church in Millsboro.

This mitigator is a factor.

13) While the Defendant was employed, he was considered a consistent

worker whose attendance and performance were evaluated by his suspension as favorable.

The Defendant worked at Walmart as an inventory specialist for approximately two years. After leaving Walmart, the Defendant worked for DART. He lost that position in 2005 because of speeding tickets. At the time of the murder, he was employed at the taxi company and had worked earlier at McDonald's.

The Defendant has a good employment record, and it is a mitigating factor.

14) The Defendant has HIV/AIDS which was diagnosed in 1999. He is also suffering from Hepatitis C. As a result, the Defendant has expressed physical and neurological problems stemming from these conditions and the medications the Defendant is taking to combat these conditions. The Defendant is suffering from nephrolithiasis, uric acid buildup, renal insufficiency, peripheral neuropathy, chronic depression, anemia and leucopenia, enlarged prostate, and history of prostatitis. He has been under doctors care who have prescribed multiple medications for these conditions.

This mitigator has been established by the evidence, but the Defendant's medical condition did not play a part in the crimes. Mr. Small was employable as a driver. His various problems were severe enough to warrant consideration for

social security disability. An application was pending before his arrest. Although he suffers from painful, possibly fatal diseases, his HIV/AIDS condition is stabilized. Dr. Lawrence S. McDonald, medical director at SCI, treated the Defendant and believed he had a life expectancy of 16 - 18 years. His immune system is severely compromised and any infections, like pneumonia, may be fatal.

Concerning the HIV condition, the defense offered testimony from a psychiatrist, Daniel S. Smithpeter, M.D. Dr. Smithpeter opined that the HIV was likely to have brain involvement given abnormalities noted on an MRI taken in February 2009. He felt that the central nervous system involvement of HIV probably impacted Mr. Small's cognitive abilities, judgment, and impulse control. He did not question the Defendant about the homicide and, therefore, had no opinion about the Defendant's mental state during the homicide. Dr. Smithpeter's view that Mr. Small had HIV brain impairment is based largely on his interpretation of one objective medical test. The MRI was done by Dr. William A. Thomas, Jr., a neurologist on February 2, 2009 when the Defendant complained of migraine headaches. One of Dr. Thomas' findings was that there was some increased T-2 signal within subcortical and periventricular white matter bilaterally, which was most consistent with vessel ischemic change.

On the other hand, Dr. Steven M. Mechanick, a psychiatrist, related that

many normal and abnormal people have “unidentified white objects” in the white matter of the brain that can be caused by cocaine. However, he testified that the white matter changes have no significance because they are not diagnostic. As explained by Dr. Mechanick, an increased T-2 signal is like having a freckle where more specialized information would be required to determine if it were cancerous.

Dr. Mechanick’s opinion that there was no HIV impairment to the brain is more persuasive than Dr. Smithpeter’s opinion. Dr. Zingaro also believed that there was no brain disorder. Rather, the Defendant met the diagnostic criteria for anti-social personality disorder and did not have HIV-related dementia or delirium. Dr. Smithpeter agreed that the Defendant has anti-social personality disorder. This condition is well documented in the Defendant’s record from Devereux through his criminal history, showing misbehavior, disrespect for authority, and general lack of remorse. Despite these factors, Devereux recognized his leadership abilities and potential to succeed.

The medical records show that the Defendant complained about not being able to remember things. However, he had sufficient performance on Dr. Zingaro’s memory score of 77. As Dr. Mechanick testified, it is likely that his memory was affected by abuse of illegal drugs and prescription medications.

In his encounters with various medical providers, Mr. Small was consistently oriented as to time, person, and place. He was able to communicate clearly, exercise judgment and understand directions. The record supports Dr. Mechanick's opinion that the Defendant was organized and clear in his thinking, that there were no signs of delirium or hallucinations, and that Mr. Small's memory was adequate. He named the presidents from Obama to Nixon, did subtraction and understood abstract concepts.

While the Defendant's HIV/AIDS condition is severe, it did not play a role in June McCarson's homicide.

Mitigators 15 and 16 will be considered together as they are related.

15) The Defendant has a chronic substance abuse problem which the Defendant has not dealt with adequately. As a result of his prior robbery convictions, the Defendant was Court ordered to an intensive long term residential substance abuse program known as the Key Program, this was to be followed by a residential/outpatient drug treatment program know as the Crest Program, this was to be followed by a long term of probation. The Defendant was medically excused from these programs as a result of his HIV/AIDS and Hepatitis C medical conditions. The Defendant was not provided with any short term or long term substance abuse treatment programs.

16) The Department of Probation and Parole failed to adequately evaluate the Defendant's need for substance abuse treatment in lieu of the Key/Crest programs originally ordered by the Court. They failed to properly supervise the Defendant during his period of probation resulting in him returning to his drug use.

\_\_\_\_\_The Defendant has a history of under-reporting his chronic drug use. As previously explained, the Defendant was excused from the Key Program, which is a rehabilitation regime designed as a continuum. The Defendant would not likely have been successful in the Crest Program because of his physical limitations. However, the defense statement that "The Defendant was not provided with any short term or long term substance abuse treatment programs," is not correct. The Defendant was at fault for not being candid about his drug use, and his claim that P & P failed him is inaccurate for the same reason.

The Defendant was at Level 3 probation following his release from SCI on December 27, 2008. During P & P visits at home and his appointments at the P & P office, the Defendant appeared cooperative. He abided by curfew, paid his financial obligations and stayed out of trouble. Further, he appeared to be dealing with his medical issues appropriately through Christiana Care and Sussex County Counseling. According to Celeste, he willingly went to Sussex County

Counseling, an alcohol and drug-related treatment provider. The Defendant passed two drug tests in January and March, 2009. He was referred for a professional evaluation through Sylvia Clemens, a professional assessor, at Connections.

Based on her assessment, she did not recommend treatment at that time. On March 10, 2009, she reported that the Defendant was involved in treatment with Sussex County Counseling. The Defendant was told that if he came back with any positive urine drug screens he could be placed in a higher level of care.

Ms. Clemens' practice is to send the recommendation to P & P, but not the full report. The report includes the assessor's interview as well as the self-reporting history of the offender. P & P relies upon the assessor's ultimate opinion but never sees the report. Ms. Clemens' opinion that no drug treatment was necessary was consistent with the clean drug screens that had been submitted by the Defendant. The Defendant also participated in a risk assessment. He minimized his drug history by reporting that he used crack in 2005 "every once in a while."

Likewise, he under-reported to Ms. Clemens that he had used marijuana for 5 years, cocaine for 1 year, and heroin for 3 years during his lifetime. He admitted using cocaine in 2005 for 6 months.

Later, the Defendant acknowledged a more serious involvement with illegal substances to Dr. Mechanick, as previously explained. For example, although telling Ms. Clemens that he stopped using heroin at 24 years of age, he disclosed to Dr. Mechanick that his heroin use continued throughout his imprisonment and release in New Jersey. Celeste Small admitted knowing that the Defendant purchased heroin in New Jersey in 2002 and 2003.

With Ms. Clemens, Mr. Small denied a need for treatment for psychological or emotional problems. He denied depression and anxiety regarding his physical health. He recognized the importance to maintain individual weekly services with his counselor at Sussex County Counseling and with Christiana Care Wellness Center. His drug dependence was found to be in remission.

Because of his apparent compliance with supervision, Mr. Small was flowed down to moderate Level 2 probation. This called for office visits once every three months and random drug screen. Mr. Small missed his regularly scheduled appointment on November 2, 2009. Because he was actively using cocaine, he probably skipped the visit to avoid the risk of a screen.

In the fall of 2009, the Defendant had returned to cocaine use. Neither the Defendant nor Mrs. Small sought help, although both knew he needed it. It was available through his healthcare providers and through P & P. The price, of

course, would be a return to a higher level of supervision.

If Mr. Small had been candid, then other programs could have been considered. People in his congregation would have helped him. P & P checked the Criminal Justice Information System record periodically and found no reports of criminal activity. With their assistance, the Defendant had obtained employment and by all appearances was stable.

Based upon his good performance on probation and his lack of candor, there was no reason to provide Mr. Small with “a short term or long term substance abuse program,” and P & P acted appropriately. Given his deception, the probation officer’s decision to give the Defendant another chance was reasonable. No one is clairvoyant.

These mitigators have not been established.

17) The murder was not premeditated or the result of substantial planning.

Leslie Small decided to kill Mrs. McC Carson for her money when he drove her home. She was old. She was vulnerable. She was frail. Although the Defendant did not plan her murder far in advance, he intentionally stabbed her to death in her own home.

This mitigator bears no weight.

After weighing all relevant evidence, the Court finds by a preponderance of

the evidence in aggravation or mitigation, which bears upon the particular circumstances or details of the commission of the murder and the character and propensities of Leslie Small, that the aggravating circumstances found by the Court to exist, outweigh the mitigating circumstances the Court has found to exist. This finding is supported by the jury's unanimous recommendation of death.

### **CONCLUSION**

The Defendant has a selfish, anti-social and violent character. He has a mean streak and has not been motivated to change. His propensity for violence and to harm individuals is represented by multiple criminal episodes throughout his life. Starting with assaults at Devereux against vulnerable persons, the Defendant committed armed robbery with a shotgun in 1976. He raped, robbed, kidnapped, and terrorized a helpless woman in 1983. After 19 years in jail, he robbed a series of older Delaware women in 2005. His violent tendencies culminated in the brutal slaying of 78 year old June McC Carson.

Neither the efforts of Devereux nor the alcohol and drug treatment in New Jersey altered his violent, anti-social personality. When he moved to Delaware in 2002, the Defendant robbed victims in Lewes and Rehoboth to support his cocaine use. In 2005, he was using stolen money to support his drug use. A year after his release from prison, Leslie Small murdered June McC Carson by stabbing her 20

times with her own scissors after unsuccessfully strangling her. Voluntary drug use is no defense for any of his criminal conduct. June McC Carson was the Defendant's final victim.

The Defendant was not acting in a mindless, cocaine-induced delirium when he killed Mrs. McC Carson on November 11, 2009. The Defendant drove his vehicle properly, following directions, going various distances and obeying the rules of the road. He assisted Mrs. McC Carson in passing her deposit slip and receiving cash in return from the Wilmington Trust Company. The Defendant had an earlier fare that day, a man whom he delivered without incident. In his own handwriting, the Defendant documented his business transactions for the day. His business log reflected his operations including destinations, times, and fares.

The Defendant picked Mrs. McC Carson as his victim rather than the man because she was easy prey. He had the presence of mind to find the scissors in a kitchen drawer. He was aware that she had to be killed because he would be returned to prison for violating his probation with another robbery. He had the acuity to cover up his crimes. He tried to take the bloody scissors but dropped them; he took the bloody towel, bloody clothes, purse and threw them away, keeping \$500 for himself. He lied to his wife about being sick and later fabricated a story to the initial officer who questioned him about Mrs. McC Carson.

For the robbery and burglary counts, Mr. Small will be given mandatory life imprisonment, as required by the Delaware Habitual Offender Laws. A life sentence for the homicide is no punishment. The aggravating circumstances outweigh the mitigating ones. Mrs. McCarson was slaughtered in a horrible and prolonged death. The jury, representing the conscience of the community, unanimously recommended capital punishment. There will be no more victims for Leslie Small.

The sentence, therefore, as to Counts 1 and 3 is death by lethal injection. The sentences as to Counts 2, 4, 5, 6, and 7 is life imprisonment pursuant to 11 *Del.C.* §§ 4214(a) and 4214(b).

**IT IS SO ORDERED.**